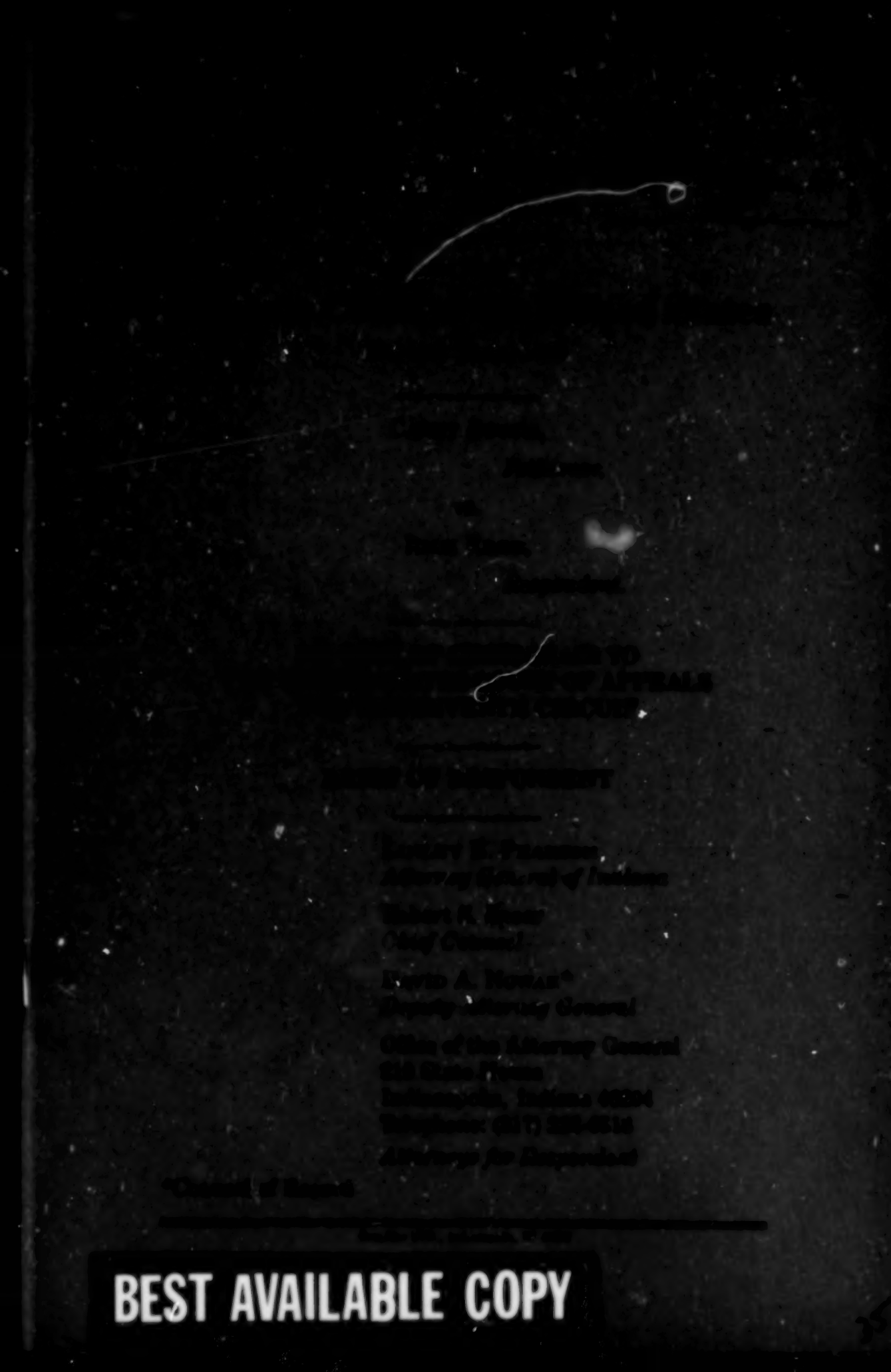

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No. 89-1715

IN THE

Supreme Court of the United States

October Term, 1990

CATHY BURNS,

Petitioner,

vs.

RICK REED,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENT

The Respondent, Deputy Prosecuting Attorney Rick Reed (hereinafter Reed), respectfully prays that the Court affirm the judgment of the United States Court of Appeals for the Seventh Circuit (hereinafter Seventh Circuit), which affirmed the judgment of the United States District Court for the Southern District of Indiana, Indianapolis Division (hereinafter District Court).

STATEMENT OF THE CASE

The question presented herein is purely legal. Both the District Court and the Seventh Circuit found that the only actions taken by Reed were to provide legal advice to police officers and to present the state's case to a state court judge during a hearing on an application for a search warrant. The only issue raised is whether such conduct is protected by the doctrine of absolute immunity.

On September 2, 1982, the Petitioner, Cathy Burns (hereinafter Burns), reported to police officers that an unknown person had entered her home, shot her sons and attacked her with a blunt instrument (Transcript157-158). Muncie Police Officers Cox and Scroggins conducted the investigation of this crime (T.22).

After a period of time, the police officers formed the opinion that Burns was the prime suspect in the shooting (T. 75). Even though the police were informed that Burns had failed a polygraph examination and a voice stress test, they lacked probable cause to arrest her (T. 75). On September 21, 1982, Burns was interrogated and verbally threatened by police officers (T.66, 164-167). Cox and Scroggins then decided to place Burns under hypnosis. Up to this point, Reed had no contact with or involvement in the police investigation (T.65-66, 111).

Reed's first involvement was on the afternoon of September 21, 1982 when Officer Scroggins made a telephone call to Reed (T.66). Officer Cox explained the reason for the phone call as follows:

> Q. And what was the conversation that you heard even though it was one-sided?
>
> A. The extent of the conversation was that we were at the time contemplating a hypnosis session with Cathy and that we wanted him to give us his opinion on whether or not we should do that. At that particular time, I think Mr. Reed was also a police liaison attorney as far as the police department was concerned. I can't say

> the exact words, but I indicated to Don to explain to him that we were aware of the fact that hypnosis of suspects may not be admissible as far as criminal proceedings were concerned; and we did advise him that she had indicated to us she wanted to do that and we wanted to know from him whether or not he felt we should proceed.
>
> * * *
>
> Q. What is your recollection about being told by Mr. Scroggins of Mr. Reed's response?
>
> A. Mr. Scroggins indicated to me that Mr. Reed indicated to us if we had no other avenue to explore, we might as well do that.

(T.101-102.)

Officer Scroggins testified as to the reason for the phone call as follows:

> A. I said that Cox and I had determined that we felt like she was the only one that could provide us additional information of the investigation and that we wanted to hypnotize her; but Cox had advised me that her being a possible suspect, that in his training, he was told that you do not hypnotize suspects.
>
> * * *
>
> Q. What did you tell Mr. Reed about Cathy Sells status as a suspect?
>
> A. The conversation with Reed was brief. It was mostly just to advise him of the point we were at in the investigation and the request from him for permission to hypnotize her.
>
> Q. What was Mr. Reed's response?
>
> A. He said for us to go ahead.

(T.37, 67.)

Reed did not recall the telephone conversation in question,

nor does he dispute the police officer's testimony concerning the telephone conversation (T.125, 127). It is undisputed that Reed was not informed of any of the details of the case, such as: that Burns had failed a polygraph and voice stress test, how long she had been at the police station, that she had become ill while at the police station, that police officers had threatened her, or that she had been deprived of lunch (T.66-67).

Other than advising the police officers to proceed with the hypnotic session, there is no evidence to indicate that Reed was involved with the hypnotic session or the investigation leading up to the session. Reed in no way instructed the officers on how to proceed with the hypnotic session (T.113). Shortly after the hypnotic session, Officers Scroggins and Campbell arrested Burns (T.67-69, 72, 114).

Either during the hypnotic session or shortly thereafter, Reed received a phone call requesting that he come to the police station to give some advice on the Burns case (T.125-126). Reed recalled the reason for his attendance at the police station as follows:

> Generally, I arrived at the detective headquarters. The only person I recall speaking to was Dr. Ken Joy. When I arrived, he was already there. But he began to tell me about what was going on. I didn't recall speaking to Officer Cox or Scroggins or any of the other officers.
>
> I do recall seeing them there. I asked Dr. Joy what was going on. He proceeded to tell me about this hypnosis session that he had either witnessed or viewed a tape of. I asked him some questions about it; in response to which he told me that what he had seen gave him cold chills; that he thought it was quite possible we had a real case of split personality and this was a person who needed to be in the hospital and not in jail.
>
> Somebody — I think it was Dr. Joy — asked me if that was possible if she could go to the hospital instead of jail. I gave my opinion that could be done.

(T.130-131.)

Officer Cox described the reason for Reed's presence at the police station and the advice given as follows:

> Q. Did Mr. Reed participate in the decision to arrest Cathy at that time based upon the information you had supposedly obtained from her under hypnosis?
>
> A. The extent of his participation was my explaining to him what we had developed as a result of the hypnotic session and asking if he felt like we had probable cause to make that arrest. It was decided during the discussion, of course, to — that she would not be kept in the Delaware County Jail; that she would be taken to Ball Memorial Hospital. And, in fact, in order for us to take her to the hospital and have her committed to the psychiatric floor for examination we had to have an official police hold put on her which was the arrest.
>
> Q. When you asked Mr. Reed of his opinion about probable cause, what was his response?
>
> A. Mr. Reed indicated that we probably had probable cause for the arrest.

(T.107-108; see also, T.115.)

Officer Scroggins described Burns' arrest and Reed's involvement in the arrest as follows:

> A. I told her we were going to arrest her at that point.
>
> Q. Prior to that time though, excluding the telephone conversation with Mr. Reed, did you discuss with Mr. Reed the decision to arrest Cathy Sells [Burns]?
>
> A. No. That's not the policy. We arrest people. The police department arrests people. And the prosecutor's office is the one that actually files the formal charge.
>
> Q. Is it a practice — my next question is is it a practice for you to consult with the prosecutor's department or office before you arrest an individual?
>
> A. No.

Q. And you did not do so in this case?

A. No.

* * *

Q. Did you and Mr. Reed and anyone else you can think of engage in a discussion about whether or not to arrest Cathy?

A. I was in the room. And Marvin Campbell had come in the room. And they were the ones that actually arrested Cathy and advised her that she was being placed under arrest.

Q. So the decision to arrest, if it took place, you don't recall whether Mr. Reed was part of that or you didn't hear him being part of that?

A. No, I didn't hear. The only involvement that I can recall Mr. Reed being involved in was after we had filled out the arrest sheet on Cathy. Then we went into the hallway. And Mr. Reed and Dr. Joy, Captain Cox, and Deputy Chief Bodkin was there. And the decision was made then whether to take her to the hospital rather than take her to jail. . . .

(T.69, 38-39.)

The day following Burns' arrest, Reed and Officer Scroggins appeared before the trial court and obtained a search warrant for the search of Burns' residences. In Indiana, a prosecutor's presence is not necessary for a police officer to obtain a search warrant. Ind. Code §33-35-5-1 *et. seq.* However, the state court trial judge testified before the District Court that, in her court, the presence of a prosecutor was necessary and that it would not be possible for a police officer to obtain a search warrant on his own (T. 5).

The trial judge was not informed of the fact that Burns' only confession, which formed the probable cause for the warrant, was obtained through the use of a hypnotic session. Burns made no other confession. In explaining the omission of this fact from the evidence, Reed stated:

> My testimony is that when I was questioning Lieutenant Scroggins in front of Judge Cole, I was under the assumption that he had interviewed her and gotten a confession from her. We are not talking about the hypnosis session. I knew about that. I had been there the following evening.

(T.136.)

Reed testified that he was under the impression that Burns had confessed in an interview other than the hypnotic session. He was provided this incorrect information from another individual, thought to be Michael Alexander (T.134-140, 147-148). Other then his in-court participation in obtaining the search warrant, Reed had no other involvement in the search (T.121).

There was no evidence in the District Court that Reed either participated in a decision or instructed the police officers in question to conceal the fact that the confession was obtained from a hypnotic session. Officer Scroggins, who testified at the search warrant hearing, testified in the District Court that he had no prior discussion with Reed concerning his testimony and was never instructed by Reed not to talk about hypnosis (T.50-51; see also T. 46, 48, 137). None of the witnesses indicated that there was an attempt to conceal the fact that the confession was obtained pursuant to a hypnotic session (T.109, 133).

Eight days later, an information was filed thereby initiating a prosecution against Burns and an arrest warrant was obtained (T.11-12). It is undisputed that the affidavit of probable cause which supported the issuance of the arrest warrant made no reference to the fact that Burns' confession was obtained pursuant to hypnosis.

There is absolutely no evidence in the record that Reed made any statements to the press. In fact, the contrary is true (T.51, 110, 130, 147).

After a week of trial and at the conclusion of Burns' case, the District Court granted Reed's motion for a directed verdict. The District Court found that the evidence established that Reed's only involvement in the case was to render legal advice

to police officers, to represent the government in a state court proceeding concerning an application for a search warrant, and to initiate a criminal prosecution. Pursuant to this evidence, the District Court held that Reed was entitled to absolute immunity for his activities. (Petition Appendix, page 15a.) The Seventh Circuit affirmed the District Court's decision. (Petition Appendix, page 1a.)

SUMMARY OF THE ARGUMENT

A prosecutor's function of rendering legal advice to police officers and appearing before a trial court to seek a search warrant are quasi-judicial functions which must be protected by absolute immunity from civil liability.

Both the District Court and the Seventh Circuit found that the only functions Reed performed were to render legal advice to police officers and to appear before a state trial court as the government's attorney to elicit testimony in support of an application for a search warrant. These factual determinations are not subject to review by this Court.

The function of rendering legal advice to police officers is a quasi-judicial function which must be protected by absolute immunity to free the judicial process from harassment or intimidation and to accomplish the desired objective of the stricter and fairer enforcement of the laws. Public policy mandates that the police be able to obtain legal advice concerning investigative techniques they are about to perform so they will not be in a position where they must make their best guess as to what a suspect's rights are. The prosecutor, as the government's attorney, is trained to give legal advice to police officers and he must be able to do so to properly fulfill the duties of his office. The denial of absolute immunity would discourage, if not prevent, communication between police officers and the prosecutor, thereby hampering the stricter and fairer enforcement of the laws, one of the central goals of the criminal justice system.

The function of appearing before the trial court as the government's attorney and eliciting testimony in support of an application for a search warrant is also a quasi-judicial function deserving the protections of absolute immunity. It is preferable that the government's attorney be involved in this process, as he can evaluate the evidence and determine whether probable cause exists for the issuance of the search warrant and then assist the detached magistrate in the probable cause determination. Such a function is a vital part of the judicial process which must be protected by absolute immunity. If absolute immunity were not afforded, prosecutors would not participate in such proceedings, to the detriment of the criminal justice system.

This Court has determined that the question of whether immunity applies is a question of law to be decided by the District Court. In this case, there were no facts in dispute which would establish that Reed engaged in any investigative function and therefore the District Court properly determined that Reed was entitled to the protections of absolute immunity. Since there were no disputed facts, the jury properly played no role in the determination of the immunity question.

ARGUMENT

I.

DEPUTY PROSECUTOR REED'S CONDUCT WAS NOT INVESTIGATIVE, BUT QUASI-JUDICIAL, IN THAT IT WAS LIMITED TO RENDERING LEGAL ADVICE AND APPEARING BEFORE THE COURT AS THE GOVERNMENT'S ATTORNEY

In *Imbler v. Pachtman*, 424 U.S. 409, 431 (1976), this Court held "that in initiating a prosecution and in presenting a State's case, the prosecution is [absolutely] immune from a civil suit for damages under [42 U.S.C.] § 1983." The Court recognized that not all activities of a prosecutor would be protected by the grant of absolute immunity. If a prosecutor engages in investi-

gative activities, he is entitled to a qualified immunity or a "good faith defense comparable to the policeman." *Id.*, at 430. However, activities of a prosecutor which are an "integral part of the judicial process" are to be afforded the protection of absolute immunity. *Id.*

Reed does not dispute the foregoing legal conclusions nor does he attempt to argue that investigative activities should be protected by absolute immunity. Reed agrees that when he engages in conduct comparable to that of a police officer he is protected only by qualified immunity. In this case, there is no evidence that Reed engaged in any conduct comparable to that of a police officer. He did not participate in any interrogation or hypnotic session of Burns, he conducted no investigation of Burns, nor did he arrest Burns. The police officers in question engaged in such conduct. Reed's conduct in this case was limited to rendering legal advice to police officers and appearing before a state trial court to obtain a search warrant; these are functions of an Indiana prosecuting attorney in a criminal case.

The District Court found as a fact that Reed's conduct was limited to rendering legal advice and appearing before a state trial court as follows:

> When we began this case, there were four areas in which the defendant was charged with violating the constitutional rights of the plaintiff. One was that he authorized this hypnosis. Another was that he participated in the arrest without a warrant and in obtaining a search warrant without probable cause and that he defamed or slandered the plaintiff after she was released by making certain statements to the newspapers.
>
> According to the *Henderson* case [*Henderson v. Lopez*, 790 F.2d 44 (7th Cir. 1986)], a prosecuting attorney or deputy prosecuting attorney has absolute immunity when what he does is done in a quasi-judicial role. I am sure there is no dispute about that fact as established in *Imbler v. Pachtman*, the Supreme Court case.
>
> The question is whether he is operating in a quasi-

> judicial role. The *Henderson* case, which is a Seventh Circuit interpretation of *Imbler v. Pachtman* to some extent at least, even though it doesn't mention it, sets up certain criteria for determining whether or not the prosecuting attorney is acting in a quasi-judicial role. And it says flat out that giving advice, legal advice, is operating or acting in a quasi-judicial role.
>
> Now, the testimony in this case about the Defendant Reed is both the police officers — Cox and the other officer, Scroggins — agree that they called Reed on the phone at his home. Well, his home is immaterial. But, anyway, they called him on the phone and asked if it would be proper or permissible to hypnotize the plaintiff. And he said yes.
>
> I don't think there is any question that is giving legal advice. He didn't initiate it. He didn't suggest it. According to his testimony, which is the only positive testimony on the subject, he was home cutting his yard or something. At least he was home when the call came. So he was giving legal advice.
>
> On the seeking of the arrest without a warrant, there is a conflict in the evidence as to whether the plaintiff was arrested before or after someone talked to Mr. Reed. But the evidence that someone did talk to Mr. Reed was simply that the police officer asked Reed if in his opinion there was probable cause for the arrest of the plaintiff; to which the response was yes. There again, that's calling for a legal opinion which he gave. He says he was under the impression there was a separate confession other than on the tape or on the hypnotic session which, of course, there was not. But that's beside the point. The question was is there probable cause to arrest this lady. And he said yes, I think so. That's a legal opinion.
>
> Finally as to getting the search warrant, you can characterize the proceeding before the judge as testimony by Mr. Reed. And if he asked leading questions — and I think he did — why, of course, you can say that. But the fact is that it was a proceeding in court before a judge. No matter

what the form of the question was, the person seeking the search warrant and doing the testifying was the police officer. And what Mr. Reed was doing was doing his job as a deputy prosecuting attorney and presenting that evidence. Even though it was fragmentary and didn't go far enough, he did it as a part of his official duties.

The fourth phase was publicity. There is no evidence at all on that.

(T. 219-223; Petition Appendix, page 15a-16a.)

Before the Seventh Circuit, Burns argued that the District Court erred in finding that Reed's activities were limited to rendering legal advice. The Seventh Circuit rejected Burns' argument as follows:

> The remaining question is whether Reed merely gave legal advice to Officers Cox and Scroggins or whether he participated in the investigation. The officers testified that they called Reed at his home to seek his advice about the propriety of their intentions to hypnotize and question the appellant. Officer Cox testified that they called Reed because he was the police liaison for the Prosecutor's office. Both officers emphasized that they were seeking Reed's legal opinion about their proposed course of action. Based on the foregoing testimony, it is apparent that Reed was rendering legal advice to the officers and should be immune from suit, even if he did render unsound advice.

Burns v. Reed, 894 F.2d 949, 956 (7th Cir. 1990), Petition Appendix, page 13a.

Nevertheless, Burns persists in her unsupported argument that Reed directed the investigation, was otherwise involved in the investigation, and acted as a police officer. In effect, Burns asks this Court to reweigh the evidence and come to a conclusion contrary to that of the two lower courts.

Federal Rule of Civil Procedure 52(a) enjoins appellate courts from weighing facts unless the determinations of the lower courts were clearly erroneous. Traditionally, this Court

has accorded great weight to a finding of fact which has been made by a district court and approved by a court of appeals. *National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma*, 468 U.S. 85, 98 n. 15 (1984), citing *Rogers v. Lodge*, 458 U.S. 613, 623 (1982). As this Court stated in *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987):

> The Court of Appeals did not set aside any of the District Court's findings of fact that are relevant to this case. That is the way the case comes to us, and both courts below having agreed on the facts, we are not inclined to examine the record for ourselves absent some extraordinary reason for undertaking this task. Nothing the Unions have submitted indicates that we should do so. "A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271 (1978). See also *United States v. Ceccolini*, 435 U.S. 268, 273 (1978). Unless there are two or more errors of law inhering in the judgment below, as the Unions claim there are, we should affirm it.

Therefore, the question before this Court is not whether Reed engaged in investigative functions, but whether Reed's activities of rendering legal advice and appearing before a state trial court are quasi-judicial functions protected by absolute immunity. Reed's conduct can be broken down into four basic components.

First, Reed advised the police officers that they could hypnotize Burns. Burns claims that such advice violated her constitutional rights, yet she has not cited to this Court, or any of the lower courts, one case holding that a voluntary hypnosis violates a suspect's constitutional rights. Obviously, police conduct in obtaining consent to or in conducting the hypnosis may violate constitutional rights, but Reed had no involvement in or knowledge of these events. Since there was no clearly established law at the time of the events herein, and there presently is no clearly established law, which holds that Burns' constitu-

tional rights were violated due to the mere fact that she was hypnotized, the doctrine of qualified immunity as announced in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), would have protected Reed absent the District Court's finding of absolute immunity.

Second, Reed advised the police officers that there was probable cause to arrest Burns on the basis of the hypnotic testimony. Once again, Burns has failed to establish that an arrest on the basis of hypnotic testimony cannot form the basis for probable cause to arrest an individual and is therefore unconstitutional. Subsequent to Burns' arrest, the Indiana Supreme Court ruled that evidence obtained through the use of hypnosis can be used to establish probable cause for the arrest of an individual. *Gentry v. State*, 471 N.E.2d 263 (Ind. 1984). Thus, Burns seeks to recover for Reed's act of giving what turned out to be correct legal advice. In any event, the doctrine of qualified immunity would have protected Reed absent the District Court's finding of absolute immunity.

Third, Reed presented evidence before a state court judge and obtained a search warrant. It is undisputed that the evidence submitted failed to indicate that the only confession in the case was the result of hypnosis. The parties disagree as to whether the failure to inform the court that the confession was a result of hypnosis was a mistake or an intentional act, but this distinction is irrelevant if Reed's function of appearing before a trial court is afforded absolute immunity. This Court has recognized that absolute immunity must be afforded to prosecutors irrespective of their intent.

> We conclude that the considerations outlined above dictate the same absolute immunity under §1983 that the prosecutor enjoys at common law. To be sure, this immunity does leave the genuinely wronged defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty. But the alternative of qualifying a prosecutor's immunity would deserve the broader public interest. It would prevent the vigorous and

> fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system.

Imbler v. Pachtman, 424 U.S.409, 425-426 (1976), citing *Griffith v. Slinkard*, 146 Ind. 117, 44 N.E. 1001, 1002 (Ind. 1896). The Court specifically held that absolute immunity would apply to allegations that a prosecutor willfully suppressed exculpatory information. *Id.*, at 411 n. 34. Thus, the Court is not confronted with a question of fact as to Reed's motives but rather the Court is presented with the strictly legal question of whether absolute immunity protects the function of a prosecutor appearing before a trial court as the government's attorney and presenting evidence in support of an application for a search warrant. This question will be argued in Part III, *infra*.

Burns also disputes that any activity on Reed's part in obtaining the arrest warrant is protected by the doctrine of absolute immunity. To the extent that this issue has been raised, it must be noted that in Indiana an arrest warrant can only be obtained either after an indictment from a grand jury has been obtained, or after the prosecuting attorney has filed an information. Ind. Code §35-33-2-1(c). Therefore, any such conduct on Reed's part would surely be within *Imbler's* grant of absolute immunity since it is conduct occurring after the initiation of the prosecution and is part of the presentation of the state's case.

Fourth, Burns argues that Reed made statements to the press which allegedly violated Burns' constitutional rights. Burns has failed to refer this Court or the courts below to any evidence in the record which would indicate that Reed made such comments to the press. The District Court expressly found that there was no evidence of comments to the press. (Petition Appendix, page 15a.)

II.

A PROSECUTOR'S FUNCTION OF RENDERING LEGAL ADVICE TO POLICE OFFICERS IS A QUASI-JUDICIAL ACT ENTITLED TO THE PROTECTION OF ABSOLUTE IMMUNITY

In Indiana, a prosecuting attorney is a judicial officer whose position is created by the Indiana Constitution. As such, common law mandated that he be entitled to absolute immunity for his conduct. The Indiana Supreme Court has described the role of the prosecutor and the immunity to which he is entitled as follows:

> He (a prosecuting attorney) is a judicial officer, created by the constitution of the state. . . . He is the law officer to whom is entrusted all prosecutions for felonies and misdemeanors. . . . He is the legal advisor to the grand jury. We think he is an officer entrusted with the administration of justice. The prosecuting attorney, therefore, is a judicial officer, but in the sense of a judge of a court. The rule applicable to such an officer is thus stated by the eminent author: "Whenever duties of a judicial nature are imposed upon a public officer, the due execution of which depends upon his own judgment, he is exempt from all responsibility by action for the motives which influence him and the manner in which said duties are performed. If corrupt, he may be impeached or indicted; but he cannot be prosecuted by an individual to obtain redress for the wrong which may have been done. No public officer is responsible in a civil suit for a judicial determination, however malicious the motive which produced it." Townsh. Sland. & L. (3d Ed.) § 227, pp. 395,396.

Griffith v. Slinkard, 146 Ind. 117, 44 N.E. 1001, 1002 (Ind. 1896). The Indiana Supreme Court more recently concluded that common law provided prosecutors with immunity for all activities within the general scope of the authority given to prosecuting attorneys, including their duty to make statements to the press and inform the public of the activities of their office. *Foster v. Pearcy*, 387 N.E.2d 446, 449 (Ind. 1979).

Of course, 42 U.S.C. §1983 does not facially establish any immunities. However, this Court has consistently read the statute "in harmony with general principles of tort immunities and defenses rather than in derogation of them." *Imbler v. Pachtman*, 424 U.S. 409, 418 (1976). In *Tower v. Glover*, 467 U.S. 914 (1984), this Court held that if an official can point to a common law counterpart for the immunity that he asserts, then he is entitled to immunity against a §1983 action unless the history and purposes of §1983 counsel against the provision of immunity. *Id.*, at 920. Unlike the police officers in *Malley v. Briggs*, 475 U.S. 335 (1986), Reed can point to the immunity available at common law and argue that it should apply to the quasi-judicial acts he performed herein.

This Court interpreted §1983 to give absolute immunity to *functions* "intimately associated with the judicial phase of the criminal process." *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976). As this Court explained in *Briscoe v. LaHue*, 460 U.S. 325, 334-335 (1983), the immunity is not given to protect individuals who perform functions nor to shield individuals from liability, but because any lesser degree of immunity for the function itself could impair the judicial process. Therefore, it is the function that the individual is performing, not the fact that an individual holds a particular office or position, which results in the granting or denial of absolute immunity. This approach was recently explained as follows:

> Running through our cases, with fair consistency, is a "functional" approach to immunity questions other than those that have been decided by express constitutional or statutory enactment. Under that approach, we examine the nature of the functions with which a particular official or class of officials has been lawfully entrusted, and we seek to evaluate the effect that exposure to liability would likely have on the appropriate exercise of those functions. Officials who seek exemption from personal liability have the burden of showing that such an exemption is justified by overriding considerations of public policy, and the Court has recognized a category of "qualified immunity"

> that avoids unnecessarily extending the scope of the traditional concept of absolute immunity.

Forrester v. White, 484 U.S. 219, 224 (1988), citing *Scheuer v. Rhodes*, 416 U.S. 232 (1974); *Butz v. Economou*, 438 U.S. 478 (1978); *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Stump v. Sparkman*, 435 U.S. 349 (1978).

This Court also explained its long-standing view that individuals other than the judges or prosecutors may be entitled to absolute immunity, depending upon the function that they perform. For example, this Court explained:

> In the years since *Bradley* was decided, this Court has not been quick to find that federal legislation was meant to diminish the traditional common law protections extended to the judicial process. *See, e.g., Pierson v. Ray*, 386 U.S. 547 (1967). On the contrary, these protections have been held to extend to executive branch officials who perform quasi-judicial functions, see *Butz v. Economou*, *supra*, 438 U.S., at 513-514, or who perform prosecutorial functions that are "intimately associated with the judicial phase of the criminal process," *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976). The common law's rational for these decisions - freeing the judicial process of harassment or intimidation - has been thought to require absolute immunity even for advocates or witnesses. See *Briscoe v. LaHue*, 460 U.S. 325 (1983); *Butz v. Economou*, *supra*, 438 U.S., at 512.

Forrester v. White, 484 U.S. 219, 225-226 (1988).

Therefore, prosecutorial immunity protects not only the specific activities presented in *Imbler*, but also extends to all other functions which are quasi-judicial in nature. Such quasi-judicial functions must be afforded absolute immunity in order to free the judicial process from harassment or intimidation.

The prosecutor's conduct in this case amounted to nothing more than rendering a legal opinion that it would be permissible to hypnotize Burns. The Seventh Circuit found that the function of rendering a legal opinion to police officers was

similar to the everyday work of lawyers and judges and was therefore quasi-judicial. *Burns v. Reed*, 894 F.2d 949, 954 (7th Cir. 1990), citing *Henderson v. Lopez*, 790 F.2d 44 (7th Cir. 1986); *Mother Goose Nursery Schools, Inc. v. Sendak*, 770 F.2d 668, 671 (7th Cir. 1985), *cert. denied*, 474 U.S. 1102 (1986); *Citizen Energy Coalition of Indiana, Inc. v. Sendak*, 594 F.2d 1158 (7th Cir. 1979), *cert. denied*, 444 U.S. 842 (1980). In rendering legal advice, the prosecutor performs a function similar to that of a judge. Both a prosecutor and a judge review the facts of a given case, then render an opinion concerning legality. *Henderson v. Lopez*, 790 F.2d 44, 46 (7th Cir. 1986).

Reed's advice that probable cause existed for Burns' arrest amounted to even more than a quasi-judicial legal opinion; in assessing probable cause, the prosecutor is also making a decision concerning the initiation of the state's case. The decision that probable cause exists for an arrest is part and parcel of the larger process of initiating a prosecution and therefore is entitled to immunity pursuant to *Imbler*. *Marx v. Gumbinner*, 855 F.2d 783, 790 (11th Cir. 1988); *Myers v. Morris*, 810 F.2d 1437 (8th Cir. 1987). See also, *Imbler v. Pachtman*, 424 U.S. 409, 423 n. 20 (1976). It must be noted that this rationale has not been accepted by all of the circuit court of appeals. *Compare, Wolfenbarger v. Williams*, 826 F.2d 930 (10th Cir. 1987); *Benavidez v. Gunnell*, 722 F.2d 615 (10th Cir. 1983).

However, the determination that Reed's conduct was a quasi-judicial function does not end the analysis. The immunity should only attach to the quasi-judicial act if the immunity is necessary to free "the judicial process from harassment or intimidation." *Forrester v. White*, 484 U.S. 219, 226 (1988). This concern was recognized in *Imbler* as follows:

> The common-law immunity of a prosecutor is based upon the same considerations that underlie the common-law immunities of judges and grand jurors acting within the scope of their duties. These include concern that harassment by unfounded litigation would cause a deflection of the prosecutor's energies from his public duties, and the

possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust. One court expressed both considerations as follows:

"The office of public prosecutor is one which must be administered with courage and independence. Yet how can this be if the prosecutor is made subject to suit by those whom he accuses and fails to convict? To allow this would open the way for unlimited harassment and embarrassment of the most conscientious officials by those who would profit thereby. There would be involved in every case the possible consequences of a failure to obtain a conviction. There would always be a question of possible civil action in case the prosecutor saw fit to move for dismissal of the case . . . The apprehension of such consequences would tend toward weakening the fearless and impartial policy which should characterize the administration of this office. The work of the prosecutor would thus be impeded, and we would have moved away from the desired objective of stricter and fairer enforcement." *Pearson v Reed*, 6 Cal.App.2d 277, 287, 44 P.2d 592, 597 (1935).

Imbler v. Pachtman, 424 U.S. 409, 423-424 (1976).

The Seventh Circuit approached this concern by citing the three factors listed in *Butz v. Economou*, 438 U.S. 478 (1978) to determine whether absolute immunity should apply.

> First, we examine the historical or common-law basis for the immunity in question. Second, we examine whether the function which the official performs subjects him to the same obvious risks of entanglement in vexatious litigation as is characteristic of the judicial process. With this second factor we consider the possibility that losers will bring suit against the decision-makers in an effort to retaliate the underlying conflict and charg[e] the participants in the first with unconstitutional animus. And third, we consider whether the official is subject to checks upon abuses of authority, such as correction of error on appeal.

Burns v. Reed, 894 F.2d 949, 954 n. 4 (7th Cir. 1990).

The application of all of these tests mandates the conclusion that the function of giving legal advice to police officers is a function deserving of absolute immunity. The immunity of a prosecutor was recognized at common law. Secondly, the immunity will free the judicial process of harassment or intimidation, will avoid numerous lawsuits against prosecutors and will accomplish the objective of stricter and fairer enforcement of the laws.

The unfettered ability of prosecuting attorneys, city attorneys, county attorneys and state attorneys general to freely advise police officers is of paramount public concern. Such an ability provides police officers with guidance on what conduct is permissible in a given case, thereby making the legal system fairer. If a police officer is unable to ask for legal advice, he may well unknowingly violate a citizen's constitutional rights. In the instant case, had there been a prohibition against hypnotizing Burns, the police officers could have avoided the violation by asking for such advice. Furthermore, it would be quite impossible for a prosecutor to effectively perform the duties of his office without being able to contact the police and advise police officers on legal matters. The failure of police officers to follow the law can and will jeopardize any prosecution. A prosecutor must, therefore, render legal advice to assure effective prosecution of criminals; such conduct should be encouraged. To subject a prosecutor to §1983 liability without the cloak of immunity for the rendering of legal advice would surely diminish the effectiveness of a prosecutor and the overall fairness and quality of the judicial system.

The fear of vexatious litigation could, and in fact would, discourage prosecutors from rendering any legal advice to police officers; that in turn could seriously hamper the state's ability to effectively prosecute criminals. Furthermore, the absence of immunity would affect every criminal prosecution. Even a visit to a police station by a prosecutor could be construed as an investigative act by the prosecutor. Even if the prosecutor simply renders legal advice, will criminal defense

attorneys respond by filing civil litigation in response to the indictment or information? Will releases from civil litigation routinely become part of the plea bargaining process or part of the stipulation of dismissal for the criminal charge? To deny absolute immunity for the act of rendering legal advice simply opens the prosecutor and the criminal process to unlimited challenges from criminal defendants. That is exactly what has happened in this case. Reed had a telephone conversation and visited the police station during which time he rendered legal advice. As a result, Burns argues that Reed's right to absolute immunity should be forfeited. If a telephone call from a police officer or a simple visit to a police station for the sole purpose of rendering legal advice can result in the loss of absolute immunity, can we ever expect a prosecutor to visit the police station for any purpose? Can we realistically expect a prosecutor to have any contact with the police concerning a case prior to the obtaining of a indictment or the filing of an information? The fair and effective prosecution of criminals mandates cooperation between law enforcement officers and government attorneys. Adoption of the position advocated by Burns herein and the denial of absolute immunity for the rendering of legal advice will destroy all cooperation between the police and prosecutors and thereby hamper the criminal justice system. Qualified immunity is appropriate when the prosecutor acts and functions as a police officer. However, absolute immunity is required when a prosecutor acts as the government's attorney and renders a legal opinion to police officers.

The Seventh Circuit accurately described the consequences of the denial of absolute immunity for the prosecutor's function of rendering legal advice as follows:

> We have little doubt that a prosecutor's risk of becoming entangled in litigation based on his or her role as a legal advisor to police officer is as likely as the risks associated with initiating and prosecuting a case. As the present case illustrates, police officers do turn to a prosecutor when they are uncertain about the legality of a possible investigative technique. And this is as it should be. We do not

> hesitate to recognize that the decision at hand should be guided, in part, by sound policy considerations. With that in mind, it is entirely likely that if prosecutors were granted only qualified immunity from suits for conduct relating to their role as the officers' legal advisors, the end result would be to discourage prosecutors from fulfilling this vital obligation. Police officers, in turn, would be left to take their best guess as to what a suspect's rights are. On balance, one of the central goals of the criminal justice system would be dramatically undercut. Police officers will be less well-informed about both their ability to employ certain investigative techniques, and the possibility that their proposed conduct will violate the rights of their suspects.

Burns v. Reed, 894 F.2d 949, 955-956 (7th Cir. 1990).

Reed also has the burden of establishing that absolute, and not qualified immunity, is "justified by overriding considerations of public policy." *Forrester v. White*, 484 U.S. 219, 224 (1988). In this case, as explained *supra*, Reed would have been protected by the doctrine of qualified immunity for his advice that it was proper to use hypnotic testimony as a basis for the probable cause determination. However, if it is assumed that the law was then clearly established that hypnotic testimony could not be used to support a probable cause determination, the doctrine of qualified immunity would have afforded Reed no protection irrespective of any other aspect of the case. Qualified immunity would not protect a prosecutor if he renders a legal opinion on the basis of erroneous information obtained from police officers or, as in the instant case, when the prosecutor was acting under the mistaken impression that a confession other then the hypnotic confession was obtained. Qualified immunity would not protect the prosecutor from simple acts of negligence in the rendering of legal advice.

Qualified immunity only protects a prosecutor when the law is not clearly established and the prosecutor proceeds to render an opinion on what the law should be. Such an inadequate

protection for the function of rendering legal advice violates the reasoning of this Court in *Imbler.* Qualified immunity would not protect a prosecutor from unfounded litigation which would cause a deflection of the prosecutor's energies from his public duties. *Imbler v. Pachtman*, 424 U.S. 409, 423 (1976). In fact, the provision of qualified immunity would generate more lawsuits. If it can be assumed that in most situations a prosecutor will render proper legal advice, advice in accordance with currently established law, a prosecutor can be sued in every instance when he acted properly, and qualified immunity will not terminate the lawsuit at the outset. A prosecutor will have to proceed with the litigation and establish that his advice was proper under the facts of the given case or that the advice was based upon erronous information received from police officers. Denial of absolute immunity will leave the prosecutor, who rendered proper legal advice, without any immunity protections. Under such circumstances, the public cannot expect the office of the prosecutor to be administered with courage and independence, *Id.*, at 423, because a prosecutor could be sued any time he renders legal advice; only the prosecutor who renders an opinion on a matter where the law was not clearly established would be entitled to the protection of qualified immunity. Absolute immunity is the only protection which will adequately protect a prosecutor when he fulfills this important function and is the only protection which encourages and fosters the spirit of cooperation that the public deserves between the government's attorney and police agencies.

An Indiana prosecuting attorney, a constitutional judicial officer in the same sense as a judge, entrusted with the administration of justice, *Griffith v. Slinkard*, 146 Ind. 117, 44 N.E. 1001, 1002 (Ind. 1896), should be afforded absolute immunity for those functions necessary to the proper operation of the prosecutor's office. A prosecutor must fulfill his or her obligation as the government's attorney in criminal proceedings. Reed maintains that the function of providing legal advice to police officers is a quasi-judicial act which deserves the protections of absolute immunity. Contrary to Burns' assertions, such conduct is not comparable to that of a police officer, for it is hard to imagine how a police officer without a law degree would generally be competent to render a complex legal opinion. The prosecutor, the government's attorney, is the individual who possesses the skill and abilities to perform this function. These men and women are charged with the responsibility of representing the state, assuring the proper conviction of the guilty and the exoneration of the innocent. To fulfill this duty, it is entirely proper and necessary that prosecutors render legal advice so as to insure stricter and fairer enforcement of the law. The government's attorney does not perform functions comparable to that of a police officer, unless he actually becomes involved in the investigation. For example, in this case, if Reed had been involved in the actual hypnosis of Burns, that would be investigative. If such conduct on Reed's part had been established, then, and only then, would Reed have forfeited his entitlement to absolute immunity. But as long as the prosecutor's function is limited to the rendering of legal advice, a quasi-judicial act, public policy requires the protections of absolute immunity.

III.

A PROSECUTOR'S FUNCTION OF APPEARING BEFORE A TRIAL COURT AND PRESENTING EVIDENCE IN SUPPORT OF AN APPLICATION FOR A SEARCH WARRANT IS ENTITLED TO THE PROTECTION OF ABSOLUTE IMMUNITY.

On September 22, 1982, the day after the hypnotic session, Chief Deputy Prosecuting Attorney Reed arrived at work and was asked by the Prosecuting Attorney, Michael Alexander, to go to court and assist a police officer from the Muncie Police Department in an attempt to get a search warrant (T. 134). Reed had no prior discussion with the police officers concerning the application for the search warrant (T. 137). He reviewed several police reports and obtained information from Alexander, his superior, concerning what information was available

(T.134-137). Reed then proceeded to court and, as the government's attorney, elicited testimony from Officer Scroggins in support of the application for a search warrant. A transcript of this hearing can be found in the Petition Appendix, pages 19a-22a. There is absolutely no evidence that Reed had any prior contact with the police concerning whether a search warrant could be obtained. There was no evidence that Reed discussed the situation with the police prior to the hearing. There is no evidence that Reed had any further involvement in the events surrounding the search warrant. He did not participate in the search in any way. The only function Reed performed was to appear in open court and act as the government's attorney. He questioned a witness as to the factual basis for the application for the search warrant.

It is undisputed that the trial court was not informed that the confession from Burns, which formed the sole basis for the search warrant, was obtained as a result of a hypnotic session. Reed explained that he was under the mistaken impression that there was a second confession which was obtained in the absence of a hypnotic session and that he obtained this erroneous information from Michael Alexander (T. 134-136). Burns argues, without evidentiary support, that Reed intentionally lied to or misled the state trial court so as to assure the issuance of the search warrant. Any dispute as to the motives of the prosecutor or the reason for the failure to provide the trial court with allegedly relevant information, is simply irrelevant. *Imbler v. Pachtman*, 424 U.S., at 425-6, citing *Griffith v. Slinkard*, 146 Ind. 117, 44 N.E. 1001, 1002 (Ind. 1896). What is relevant to this discussion is whether the act of appearing before a trial court as the state's lawyer and advocate is a quasi-judicial function protected by absolute immunity.

In Indiana, a prosecutor's presence is not necessary for a police officer to obtain a search warrant. Ind. Code §33-35-5-1 *et. seq*. However, the state court trial judge testified before the District Court that, in her court, the presence of a prosecutor was necessary and that it would not be possible for a police

officer to obtain a search warrant on his own (T. 5). The evidence needed to support an application for a search warrant may be made by affidavit, or pursuant to testimony presented in open court, as was done in the instant case. When eliciting testimony in this cause, Reed acted as the government's attorney and asked questions of Officer Scroggins. It is undisputed that only an attorney or the judge can ask questions in an Indiana court. Reed was not sworn as a witness nor did he testify. His sole function was to act as the government's attorney and present the state's case.

As discussed *supra*, in determining whether absolute immunity should attach, this Court looks to the function involved. In the instant case, the function was that of an officer of the court presenting evidence in support of the state's case. This is the very conduct which the *Imbler* court held was protected by the doctrine of absolute immunity.

Furthermore, it is obvious that Reed's conduct was quasi-judicial, in that Reed was acting as an attorney while appearing before the trial court. It is also an act that deserves the protections of absolute immunity. It is preferable that the government's attorney be involved in this process in order to make the enforcement of criminal laws fairer and stricter. An attorney can evaluate the evidence and determine whether probable cause exists for the issuance of the warrant. The attorney can then assist the detached magistrate in the probable cause determination. Under such circumstances, the attorney is not performing a function comparable to that of a police officer, who gathers the evidence necessary to obtain the warrant, then testifies to said facts. The attorney is performing a quasi-judicial function in that he evaluates the evidence and presents the state's case.

Absolute immunity for such functions is necessary to shield the judicial system from harassment and intimidation and the lawsuits that would surely be filed if absolute immunity is lost for such functions. Without absolute immunity, all prosecutors would be subject to civil litigation whenever they have partici-

pated in a search warrant proceeding. Under such circumstances, a prosecutor who is not judgment proof would logically refrain from offering any advice to police officers concerning an application for a search warrant and would refuse to participate in the judicial warrant application procedure. The end result would be the absence of cooperation between the police and the prosecutor's office prior to the filing of criminal charges, to the detriment of all citizens, the police, and the prosecutor's ability to effectively prosecute criminals. In addition, every time a defense attorney in a subsequent criminal prosecution filed a motion to suppress the evidence obtained from a search, would it not also be prudent for him to file a civil action against the prosecutor? Once again, the prosecutor would be put in the position of obtaining a release from civil liability along with any plea bargain or stipulation of dismissal of the criminal charges. Such harassment and intimidation of the criminal justice system cannot be tolerated if the public expects a prosecutor to effectively and fearlessly perform his or her duties.

Reed does not argue that he is entitled to absolute immunity when he acts as a police officer and collects evidence to support a search warrant, signs an affidavit, testifies to facts necessary to support a search warrant, or participates in the execution of the search warrant. But when the only activity of the prosecutor is to appear before the state trial court and present evidence in support of the search warrant, the case law cited *supra* demands the protections afforded by the doctrine of absolute immunity.

IV.

THE ISSUE OF WHETHER DEPUTY PROSECUTOR REED WAS ENTITLED TO THE PROTECTION OF ABSOLUTE IMMUNITY IS A QUESTION OF LAW TO BE DETERMINED BY THE COURT AND NOT A JURY

In *Imbler v. Pachtman*, 424 U.S. 409, 419 n.13 (1976), the Court recognized that the purpose of absolute immunity was to defeat a lawsuit at the outset. The immunity is from suit, not

just from damages. A judge, as a matter of law, should find that the wrongful conduct alleged is within the scope of the immunity and dismiss the cause without further proceedings.

In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the Court recognized that immunity, whether absolute or qualified, is a question of law for the trial court to decide. *Id.*, at 818-819. This was reiterated in *Mitchell v. Forsyth*, 472 U.S. 511, 527 n.9 (1985), where the Court emphasized that the determination of whether a defendant is entitled to immunity is a question of law for the court to decide. *Accord*, *Rakovich v. Wade*, 850 F.2d 1180, 1201-1202 (7th Cir. 1988) (en banc).

Burns argues that the jury should have decided the issue of whether Reed was entitled to absolute immunity. She argues that the jury should have been allowed to judge Reed's motive and intent, and his explanation for the conduct that he engaged in. Brief of Petitioner, at 25-32. What Burns fails to recognize is that motive or intent is not relevant to the immunity analysis. This Court recognized that absolute immunity must be afforded to prosecutors irrespective of their intent or motives. *Imbler v. Pachtman*, 424 U.S., at 425-6, citing, *Griffith v. Slinkard*, 146 Ind. 117, 44 N.E. 1001, 1002 (Ind. 1896). This holding was confirmed in *Harlow v. Fitzgerald*, supra, when this Court held that the subjective intent of a government official was irrelevant even to the qualified immunity issue. *Id.*, at 816-817. What is relevant is for the District Court to determine whether Reed's acts were quasi-judicial in nature. If the trial judge answers the question in the affirmative, then absolute immunity applies; judgment for the prosecutor must be entered irrespective of his intent or motive.

In the instant case, the District Court denied pre-trial motions grounded on absolute immunity based on concerns that there were questions of material fact as to Reed's actions. After a week of trial, at the conclusion of Burns' case, the evidence established that Reed functioned only as the government's attorney and was performing only quasi-judicial functions. Absolute immunity was therefore appropriate; judgment

was entered for Reed. This result is consistent with this Court's opinion in *Anderson v. Creighton*, 483 U.S. 635 (1987), where the Court recognized that trial courts would not always be able to determine whether immunity should apply on the basis of the pleadings alone. Therefore, this Court stated:

> Noting that no discovery has yet taken place, the Creightons renew their argument that, whatever the appropriate qualified immunity standard, some discovery would be required before Anderson's summary judgment motion could be granted. We think the matter somewhat more complicated. One of the purposes of the *Harlow* qualified immunity standard is to protect public officials from the "broad-ranging discovery" that can be "peculiarly disruptive of effective government." 457 U.S., at 817 (footnote omitted). For this reason, we have emphasized that qualified immunity questions should be resolved at the earliest possible stage of a litigation. *Id.*, at 818. See also *Mitchell, supra*, 472 U.S., at 526. Thus, on remand, it should first be determined whether the actions the Creightons allege Anderson to have taken are actions that a reasonable officer could have believed lawful. If they are, and if the actions Anderson claims he took are different from those the Creightons allege (and are actions that a reasonable officer could have believed lawful), then discovery may be necessary before Anderson's motion for summary judgment on qualified immunity grounds can be resolved. Of course, any such discovery should be tailored specifically to the question of Anderson's qualified immunity.

Id., 646, n 6.

This Court's prior decisions direct the District Court to determine whether immunity applies as early as possible in the legal proceeding, preferably prior to the commencement of discovery. There is no principled distinction that supports Burn's argument that the jury must make the factual determination of whether immunity applies if the case proceeds to trial. What Burns argues, in effect, is that the District Court can never direct a verdict even though the evidence indisputably supports the granting of immunity. Of course, if the evidence is disputed as to whether a prosecutor performed functions comparable to that of a police officer, then the District Court must allow the cause to go to a properly instructed jury who could find liability only if they find that the prosecutor engaged in an investigative function. There was no such disputed evidence in this case which would mandate the imposition of such a procedure.

In the instant unusual case, discovery and the filing of dispositive motions did not resolve all questions concerning exactly what functions Reed performed in the Burns case. A trial was necessary. After all of Burns' evidence was introduced, it was clear that Reed's only participation in the Burns case was to perform quasi-judicial functions. The District Court then properly made its findings of fact concerning immunity and entered judgment on Reed's behalf. No error was committed. The District Court followed every existing precedent of this Court that absolute immunity is a question of law for the judge, not the jury.

CONCLUSION

For all of the foregoing reasons, it is respectfully urged that this Court affirm the judgment of the United States Court of Appeals for the Seventh Circuit and the judgment of the United States District Court for the Southern District of Indiana, Indianapolis Division.

Respectfully submitted,

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